

# NORTHWEST ENVIRONMENTAL ADVOCATES



April 6, 2016

## FREEDOM OF INFORMATION ACT REQUEST

### FOIA OFFICER

U.S. Environmental Protection Agency  
National Freedom of Information Office  
1200 Pennsylvania Avenue, NW (2822T)  
Washington, DC 20460

Submitted via: FOIA Online

Re: **EPA Review and Action on Oregon Water Pollution Trading Rules and Guidance**

To whom it may concern:

Pursuant to the Freedom of Information Act, 5 U.S.C. § 552, *et seq.*, we are writing to request the disclosure of public documents within the control of your agency. I make this request on behalf of Northwest Environmental Advocates (NWEA).

NWEA is a non-profit environmental watchdog organization dedicated to preserving and protecting natural resources in the Pacific Northwest. NWEA works through education, advocacy, and litigation to protect and restore water in Washington, Idaho, and Oregon and across the nation. The organization has a long history of interest and involvement in environmental issues in the Pacific Northwest, in particular seeking to use the Clean Water Act programs to restore and maintain water quality for the protection of human health, fish, and wildlife.

This FOIA request concerns EPA's review and action or decision to not to review and act on Oregon's water pollution trading rules and guidance. Oregon adopted water pollution trading rules at OAR 340 Division 039 by action of its Environmental Quality Commission on December 10, 2015 and subsequently revised its guidance, entitled *Water Quality Trading* (March 31, 2016). It may or may not have submitted these to EPA pursuant to 40 C.F.R. § 123.62(a). EPA may or may not have reviewed them. This request seeks to obtain the relevant documents and to place this EPA action or inaction into context.

An identical request has been made to EPA Region 10.

### **I. FOIA Request**

In answering this request, please consider "documents" to include: reports, memoranda, internal correspondence, including electronic mail or other communications, policy and scientific reports, meeting notes, and summaries of conversations and interviews, computer records, and other forms of written communication, including internal staff memoranda. In your response, please identify which documents correspond to which requests below. This request also covers any

non-identical duplicates of records that by reason of notation, attachment, or other alteration or supplement include any information not contained in the original record. Additionally, this request is not meant to be exclusive of other records which, though not specifically requested, would have a reasonable relationship to the subject matter of this request.

We emphasize that this request applies to all described documents whose disclosure is not expressly prohibited by law. If you should seek to prevent disclosure of any of the requested records, we request that you: (i) identify each such document with particularity (including title, subject, date, author, recipient, and parties copied), and (ii) explain in full the basis on which non-disclosure is sought. In the event that you determine that any of the requested documents cannot be disclosed in their entirety, we request that you release any reasonably redacted or segregable material that may be separated and released. Furthermore, for any documents, or portions thereof, that are determined to be potentially exempt from disclosure, we request that you exercise your discretion to disclose the materials, absent a finding that sound grounds exist to invoke an exemption.

Pursuant to this request, please provide *all documents* prepared or utilized by, in the possession of, or routed through EPA related to:

1. EPA's determination, if any, that Oregon's water pollution trading rules and/or guidance constitute a "substantial" program modification or a "not substantial" modification (*see, e.g., National Pollutant Discharge Elimination System State Program Guidance for Development and Review of State Program Applications and Evaluation of State Legal Authorities* (40 C.F.R. parts 122-125 and 403) (July 29, 1986) at 2-12 – 2-13) or EPA's decision, if any, to make no determination whatsoever, including documents that pre-date Oregon's actual submission;
2. Any submission of Oregon's water pollution trading rules at OAR 340 Division 039 (approved by the Oregon Environmental Quality Commission on December 10, 2015) and/or its guidance (*Water Quality Trading*, March 31, 2016) to EPA under 40 C.F.R. § 123.62(a) or otherwise;
3. Requests by Oregon for NPDES program modification, if any, based on its adoption of water pollution trading rules and/or guidance;

In addition, please provide the following documents:

4. Any guidance, memoranda, advice, etc. on how EPA determines that a proposed NPDES program revision by a state is or is not "substantial" pursuant to 40 C.F.R. § 123.62(b)(2), that was written, published, or prepared after the guidance cited above dated July 29, 1986;
5. Any guidance, memoranda, advice, etc. on how or whether EPA evaluates whether state adoption of trading rules and policies for the issuance of NPDES permits constitutes a program revision or modification under 40 C.F.R. Part 123;
6. Any guidance, memoranda, advice, etc. on how EPA evaluates what state actions pertaining to the implementation of an NPDES program constitute the application

of discretionary authority to implement permitting practices that must be consistent with federal law and regulations versus what state actions constitute program modifications subject to EPA review; and

7. All EPA determinations, if any, that a state has made a substantial or not substantial NPDES program modification since January 1, 2006.

If there are documents that you suspect we may already have or will not desire, please feel free to call us and ask in order to avoid waste and/or delay. If there are any categories of materials that you do not believe we would find useful, please contact us to discuss a possible narrowing of this request.

## **II. Fee Waiver Request**

We hereby request a waiver of fees for costs incurred in locating and duplicating these materials, pursuant to 5 U.S.C. § 552(a)(4)(iii), because disclosure “is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” Following is a response to the fee waiver requirements set out in 40 C.F.R. § 2.107(l)(1) and (l)(2)(i)-(ii).

### **A. Whether the subject of the requested records concerns “the operations or activities of the government.”**

This request concerns documents related to water pollution trading as implemented by Oregon in its EPA-authorized NPDES program. Trading is a way for NPDES permittees to meet water quality-based effluent limits in lieu of installing pollution controls. As such it implicates the meaning of water quality standards, the meaning of NPDES permit regulations and the Clean Water Act, as well as findings in Total Maximum Daily Loads (TMDLs) and various nonpoint source programs. EPA has prepared national guidance on how water quality trading might occur but it has no regulations save those for NPDES permitting in general. This request concerns the “the operations or activities of the government” because it concerns EPA’s oversight or decision to not exercise oversight over Oregon’s permitting program insofar as it relies on pollution trading. Therefore, this fee waiver request involves records that are readily identifiable as limited to “the operations or activities of the government,” specifically in this instance the operations and activities of the U.S. EPA.

### **B. Whether the disclosure is “likely to contribute” to an understanding of government operations or activities.**

EPA has regulations that pertain to its oversight on state modifications to NPDES permitting programs and one guidance document, from 1986, that is available on its website. While EPA has written to NWEA saying that it did not intend to review Oregon’s rules once they were adopted, there is no other source by which to interpret the meaning of EPA’s rules and guidance save obtaining such material from EPA through the FOIA. There is no mechanism by which the public can gain insight into EPA’s oversight of states’ trading policies. Therefore, release of the records will most certainly contribute to an understanding of whether and how EPA intends to ensure that such trading policies conform to federal law.

In order that the requestor may evaluate EPA’s ongoing oversight or lack thereof on state trading

programs insofar as they modify NPDES permitting programs, NWEA needs access to the records that demonstrate how EPA interprets its own regulations and guidance. This will assist NWEA in evaluating whether EPA's involvement is consistent with the Clean Water Act, EPA's implementing regulations, and national guidance, and if EPA's actions or inactions are in the public interest. For this reason, reviewing records of EPA's action and rationale will be "meaningfully informative" and therefore likely to contribute to an understanding of EPA's position on water quality credit trading and its intersection with other regulatory provisions.

Having such information is "meaningfully informative" in that it ensures NWEA does not engage in frivolous or unfounded litigation and so that it can help the public understand what is or is not happening to ensure the consistency of all regulatory programs.

**C. Whether disclosure of the requested information will contribute to "public understanding."**

Disclosure of the requested records to NWEA will contribute to public understanding because the organization has expertise in this subject area of the records, an intention to disseminate the information obtained, and the connections with organizations and individuals across the country who are most likely to use the information contained within the records. NWEA has a track record of working with people as far away from Oregon as the State of Florida to assist them by conveying our understanding of EPA policies. NWEA is known for being generous with its time and information, despite its extremely limited resources. At a minimum, the audience for the information that NWEA has requested is environmental, fishing, tribal, and health organizations across the country which are interested in ensuring that NPDES permitting is conducted in a way that is sufficiently protective of human health, fish, and wildlife. In addition, NWEA has shared similar information with state agencies, federal employees, tribal governments, as well as representatives of municipal and industrial dischargers. NWEA will continue to share records as well as information analyzed from records with this same list of interest holders. NWEA has already shared information about water quality trading with organizations in Oregon and Washington and across the country, for example in presentations at the Public Interest Environmental Law Conference sponsored by the University of Oregon Law School and, most recently, at a Master Class sponsored by the Environmental Law Institute and Perkins Coie law firm in Washington, D.C. (March, 2016). In future, analysis of these records will be provided to the public.

In addition to using its relationships and networks with environmental organizations and environmental attorneys across the country, NWEA will also disseminate the records and/or its analysis of the records through the following means: through the internet from its website, on document sharing sites, through commentary to the press, through public forums in which it participates, in its newsletters, through emails to networks of organizations, through formal public comments and other formal documents prepared for agencies, and possibly in litigation. For example, NWEA has sent EPA Region X several letters discussing numerous topics of concern relating to water pollution trading and its consistency with EPA regulations, letters that have been widely circulated to concerned citizens and posted on NWEA's website.

NWEA's investigation and evaluation of the records will be made available to many other parties after it has been completed. NWEA will use the records requested to evaluate the quality of EPA decision-making and to better facilitate public participation in state and EPA processes during triennial reviews, TMDL development, permit issuances, and rulemaking, all of which

occur regularly. NWEA's dissemination of the records and of its own evaluation of the records will educate the public and advance public understanding of EPA's guidance and regulations insofar as they affect permitting and water pollution trading and EPA's oversight thereof. Thus, the release of these records will significantly contribute to the public's understanding and oversight of EPA's decision-making under the Clean Water Act.

NWEA has both the ability to interpret and to disseminate the records and/or information from this request because of its participation in all regulatory processes that take place under the Clean Water Act. NWEA has the expertise to evaluate this information and is able to disseminate the information from the records, or the records themselves, directly and indirectly with public interest organizations involved in state water pollution trading and related regulatory activities through emails, phone calls, meetings, list serves specifically devoted to communications between public interest organizations, and through its website.

**D. Whether the disclosure is likely to contribute "significantly" to public understanding of government operations or activities.**

Courts have held that the factor of whether the disclosure will contribute "significantly" to the public understanding is satisfied where the information requested is new, would supplement information currently available to the public, or add to the public oversight of the government's activities. *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1286 (9<sup>th</sup> Cir. 1987); *Judicial Watch of Florida v. U.S. Justice Dept.*, 1998 U.S. Dist. LEXIS 23441, at \*8 (D.D.C. 1998). None of the requested information has not, to the best of NWEA's knowledge, been released to the public and, therefore, qualifies as new. *Oregon Natural Desert Ass'n v. U.S. Dept. of Interior*, 24 F. Supp. 2d 1088, 1095 (D. Ore. 1998) (finding that information supporting a Bureau of Land Management NEPA analysis, but which had not been released publicly, was new for the purposes of FOIA fee waiver).

Where an organization seeking a fee waiver has explained its ability to disseminate information to the public by way of presentations to the public, other public interest organizations, participation in conferences, articles in various media and through its website, a court held that the group had met the dissemination prong of the public interest test:

Other courts have found requestors' statements of intent to disseminate requested information through newsletters, popular news outlets and presentations to the public interest groups, government agencies and the general public sufficient to entitle an organization to a fee waiver . . . . Therefore, in light of [Western Watersheds Project's] statements, the Court finds that WWP adequately detailed its ability and intent to publicize the disclosed information to more than just a narrow segment of the public. Moreover, the Court finds that if it adopted the BLM's position [that WWP would only disseminate information to a narrow audience], it would set the bar for fee waivers impermissibly high, especially in light of Congress' intent to have the fee waiver liberally construed.

*Western Watersheds Project v. BLM*, 318 F. Supp. 2d 1036 (2004). Moreover, courts have held that if it is a "close call" as to whether a requestor has met one of the factors, in light of Congressional intent that the fee waiver provision be liberally construed, a non commercial entity should be given the benefit of the doubt and be granted the fee waiver. *Forest Guardians*

*v. Dept. of the Interior*, 416 F. 3d 1173 (10<sup>th</sup> Cir. 2005). Likewise, the court in *Southern Utah Wilderness Alliance v. BLM*, 402 F. Supp 82 (2005) held that an organization's statements describing how it has commented on similar issues in federal proceedings and issued a report on a similar matter was sufficient to show it had the expertise and ability to disseminate the requested information. And, as some of the requested records may include evidence of agency inaction, a court has found that a requestor's statements concerning the agency's failure to meet statutory requirements and how the requested records would shed light on those failures was sufficient to demonstrate that the request would make a significant contribution to the public understanding. *Physicians Committee for Responsible Medicine v. Dept. of Health and Human Services*, 2007 U.S. Dist. LEXIS 20855.

Release of the records requested will contribute to the ability of nonprofit public interest oversight organizations such as but not limited to NWEA to oversee the activities and inactions of the EPA and its interactions with state regulatory agencies. In general, such organizations need to understand how and why a government has adopted various policies, whether formally or informally, or has chosen not to adopt a consistent policy, in order to review, comment on, and question the application of those policies in EPA actions and inactions and in state actions. As discussed above, NWEA participates in state rulemaking, in EPA review of state rulemaking, in permitting actions and the issuance of TMDLs, and in litigation.

This request seeks records concerning EPA's oversight of Oregon's water pollution trading policies. Obtaining the requested records will allow NWEA to understand EPA's policy or policies and take appropriate action to ensure the requirements of the Clean Water Act are met in Oregon, and elsewhere. Only by understanding the EPA's interpretation of its own regulations and guidance can NWEA meaningfully participate in its public oversight watchdog function. NWEA will also disseminate the information to organizations it works with across the country through listserves, websites, meetings, memoranda, and direct sharing of the records. This issue is of interest to journalists who have covered the use of water pollution trading.

#### **E. Commercial interests.**

Where a court has found the request to be primarily in the requestor's commercial interest, there has been specific and clear evidence of that interest. *See, e.g., VoteHemp, Inc. V. DEA*, 237 F. Supp 55 (2002)(VoteHemp's website contained links to commercial interests and the requestor's mission included business promotion). There is no such concern here. NWEA has no commercial interest in the requested records. NWEA has no mechanism to obtain funds from the use of the records, does not promote the records or analysis of them as a commercial concern, and its website contains no links to commercial interests. And, NWEA has no vested interest in the outcome of trading programs. Rather, NWEA is a non-profit public interest environmental advocacy organization working to protect public health and the environment in the Pacific Northwest and across the country. Therefore, the considerations of 40 C.F.R. § 2.107(l)(1) with regard to the possible commercial interests of NWEA do not apply because NWEA has no commercial interests and will realize no commercial benefit from the release of the requested information or as a result of any subsequent analysis it may perform on the records sought.

In conclusion, for the reasons set forth above and in the additional materials filed herewith, Northwest Environmental Advocates is clearly entitled to receive a public interest fee waiver for this FOIA request.

EPA FOIA Officer (EPA Review of Oregon Trading Rules)  
April 6, 2016  
Page 7

We look forward to your response. Please feel free to contact me at 503/295-0490 or [nbell@advocates-nwea.org](mailto:nbell@advocates-nwea.org) if you have any questions about how to respond to this request.

Sincerely,

A handwritten signature in black ink, appearing to read "Nina Bell". The signature is fluid and cursive, with a large loop at the beginning and a trailing flourish.

Nina Bell  
Executive Director